



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 17 1999

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Final Guidance for Reviewing State Funds for
Financial Responsibility

FROM: Ron Brand *Ron Brand*
Director
Office of Underground Storage Tanks

TO: UST Regional Program Managers, Regions I-X

Attached are final guidance documents for your use in reviewing State funds for financial responsibility. As a result of comments at the Seattle RPMs meeting, we developed two separate documents to assist in the review process:

"Phase 1 -- Helping Owners and Operators Comply with
the Federal Requirements"

"Phase 2 -- Meeting the State Program Approval Objective"

In response to your comments and those of the Office of General Counsel, substantive changes have been made to the "Coverage" section. In particular, a new subsection titled "Methods of Payment" has been added, and the discussion of reimbursement funds has been clarified. I believe the changes were necessary to better communicate what we are looking for in approvable fund designs. In addition, a new section has been added regarding "sunset" provisions.

I urge you to share these documents with your Office of Regional Counsel, since they play a key role in the State fund review process. If they have questions that you need assistance in answering, please let us know.

Since this issue is high on the list of many States' concerns, and it remains a somewhat complex topic, we plan to offer "training" for the Regions on using the guidance to review your State funds. As a first step, we will have a conference call during the last week of November to respond to questions that you may have on the guidance, and to discuss training needs. Dave Hamnett will be contacting you shortly regarding arrangements.

I want to thank all of those who contributed their efforts over the past few months to these final guidance documents. While it has taken some time to get to this stage, I feel confident that the guidance now reflects decisions that we and the States can all live with. As you proceed with your reviews of State funds, now and in the future, please do not hesitate to contact OUST if we can assist you in any way.

Attachments

cc: Earl Salo, OGC
Kirsten Engel, OGC
Jim McCormick
Joe Retzer

NOV 17 1989

REVIEWING STATE FUNDS FOR FINANCIAL RESPONSIBILITY

Phase 1 -- Helping Owners and Operators Comply with the Federal Requirements

States are now submitting assurance funds and other mechanisms for EPA's review and approval. This document will help EPA reviewers understand what to look for as they evaluate these submissions of State funds as financial assurance mechanisms. It will also serve as a guide as you review and comment on State funds as they are being developed.

Keep in mind that the submission of funds to EPA is totally at the State's discretion. However, a State must submit its fund to EPA if it wants formal approval of the fund as an alternative financial assurance mechanism for use by its UST owners and operators, to assist them in meeting the Federal financial responsibility requirements. States are particularly interested in assisting owners and operators who must comply with the Federal requirements by October 1989, April 1990, and October 1990.

I. Basic Purpose of Financial Responsibility

The basic purpose of financial responsibility is simply to establish reasonable assurance that someone has the funds to pay for the costs of corrective action and third-party liability resulting from an UST release. This means that someone (or combination of persons) is ready to pay from the "first dollar" of costs incurred up to the maximum amount required by the Federal regulations.

II. Identifying the Specific Purpose of EPA's Review

EPA staff may be asked to review a State fund for three different reasons.

1. The State may be looking for general advice and comment on its proposed program to provide money to assist in cleanup.

2. The State may be seeking an official decision that tank owners and operators in the State may use the Fund as a mechanism for complying with the Federal financial responsibility requirements. (Section 280.101)
3. The State may be seeking EPA approval to operate a State UST program in lieu of the Federal program. In this event the State fund may be part of the State's financial responsibility package that will be examined by the Regional Office to determine if it is no less stringent than the Federal requirements. (Section 281.37) This option is discussed in detail in the companion document "Phase 2 -- Meeting the State Program Approval Objective."

If the State is looking for general advice on its proposed fund (described in 1, above) there are no formal review criteria. However, the EPA reviewer should ask the State if it intends to allow the fund to be used by its owners and operators to comply with the Federal financial responsibility requirements (described in 2, above). If the State intends to use its fund for this purpose, you should include the elements of review outlined in this document as part of your comments so the State can make the appropriate modifications during the development phase of its fund.

EPA's review of State funds as a financial assurance mechanism will take place only where EPA is administering the financial responsibility requirements during the transition period before State Program Approval, and only when requested by the State.

III. Four Main Elements of State Fund Review

EPA's review of State funds as financial assurance mechanisms includes four main elements:

- o Funding Source
- o Amount of Fund
- o Coverage Provided
- o Eligibility for Use of the Fund

A. Funding Source

To assure that funds will be available to pay for cleanup and third-party damages, money must be reasonably certain and available. The State fund may need to rely on a definite funding source (e.g., tank fees) to make sure that funds will be available to owners and operators. A State fund that relies only on yearly appropriations out of general revenues from its

legislature would not adequately assure that funds would be certain and available. The Federal LUST Trust Fund may not be relied on for this purpose either.

Many different sources can be used to finance a State fund, such as petroleum taxes, licensing or tank fees, bond issues, and risk-based premiums. The funding sources can be used alone or in combination.

The State fund need not be reserved for use solely on underground storage tanks. For example, it may include monies to respond to above ground tank releases or surface spills, as long as adequate amounts are available for UST releases.

B. Amount of Fund

There is no magic number for approving the amount of the fund. Instead, think of the fund as a "bank account" with money being "deposited" and money being "spent" as it is needed. The goal here is to reasonably assure that the projected flow of revenues into the fund is sufficient to keep pace with the anticipated rate of expenditures from the fund.

An exact amount is not given here because the demand for funds will fluctuate over time. When reviewing this feature of a State fund, remember that not all leaks will be discovered at the same time and, more importantly, not all corrective actions (at all sites) can be performed at the same time. Furthermore, some State fund programs are designed to first look to the owner or operator to undertake and pay for corrective action and third party claims. Where the owner or operator is unable or unwilling to do so, the State will usually have to assign priorities to such sites for responses using its fund. Factors such as the number of State staff, procurement practices, and contractor availability will affect how quickly these sites can be addressed. Thus, the amount of the State fund should reflect the overall design of the State's cleanup and enforcement program, as well as the ability of the State to expend monies from the fund.

A State may want to consider various approaches that may be helpful in dealing with the uncertainty of expenditures described above. For example, a triggering provision could allow the funding source to be activated once the level of the fund has reached some bottom limit and, likewise, be deactivated when the level of the fund has reached an upper limit. A State may also want to think about adding a provision to trigger additional collection of funds when a State expects that a large release will be a significant drain on the State fund. Another provision that a State may want to consider, if it uses fees to support its fund, is to allow for a modification of the fee structure.

C. Coverage Provided

State funds can be developed to provide either full or partial coverage to help owners and operators meet the Federal financial responsibility requirements.

1. Full Coverage

A full coverage fund enables owners and operators to meet the entire Federal financial responsibility requirement (Section 280.93) by relying exclusively on the State fund for coverage. A full coverage fund assures that for all owners and operators in the State money will be available to pay for corrective action and third-party liability costs in the amounts required by the Federal regulation, as follows:

Per occurrence requirements:

- o \$500,000 per occurrence for non-marketers who pump 10,000 gallons or less each month; and
- o \$1 million per occurrence for everyone else.

Aggregate requirements:

- o \$1 million aggregate for those with 100 tanks or less;
- o \$2 million aggregate for those with more than 100 tanks.

The State fund does not necessarily need to prescribe specified limits of coverage. Limits in a State fund set maximum coverage amounts that the State fund will provide to an owner/operator for single or multiple releases occurring in a year. Without such limits, the State fund is able to cover an owner/operator for all releases in a year. On the other hand, if the State wishes to limit the coverage that it will provide for a particular release or to an individual owner/operator in any given year, it may choose to establish per occurrence or aggregate limits of coverage. However, the limits must be no less than the Federal limits above.

First Dollar Coverage

A State fund can be considered a full coverage fund even if it has a deductible amount that the owner or operator is responsible for paying, as long as it provides for "first dollar coverage" by the State. First dollar coverage simply means that if owners and operators do not meet the deductible requirement, the State can still pay for corrective action and third party claims, including the deductible amount, by using its fund. In this instance, the State may want to consider pursuing cost recovery against the owner or operator for the deductible amount, although this would be at the State's discretion.

2. Partial Coverage

A State fund may be approved as providing only partial coverage if:

- o Coverage will be provided for only a portion of the dollar amounts or types of coverage (corrective action and third-party liability) required by the Federal financial responsibility regulations; or
- o Coverage will be provided for only some owners or operators in the State. (See the "eligibility" section below for additional discussion of this choice.)

For the amounts that the State fund does not assure, or for owners and operators not covered by the fund, owners and operators are required to demonstrate financial responsibility by securing some other mechanism (such as insurance, financial test of self-insurance, letter of credit, surety bond, and guarantee) to "fill the gaps" in the State-provided coverage.

For example, a partial coverage fund might only cover from \$10,000 to \$1 million in corrective action costs. Owners and operators would need to find another mechanism to demonstrate coverage for the \$10,000 deductible for corrective action (unless the State fund provides "first dollar coverage" as described above). In this example, owners and operators must also demonstrate, through another assurance mechanism, coverage of third-party liability costs.

To help owners and operators comply with deductible requirements, EPA is allowing States to establish their own financial test of self-insurance for deductible amounts. The Federal test of self-insurance (either \$10 million or \$20 million net worth) is inappropriate when insuring for deductible amounts, which are often in the \$5000 to \$50,000 range. In establishing their test, States may want to consider requiring that the owner's or operator's minimum net worth be a specific multiple of the deductible amount.

3. Methods of Payment

Under any State fund, the State must provide reasonable assurance that it will pay full or partial coverage of cleanup and third party liability costs of an eligible owner or operator. The State can make this assurance in several ways. First, the State may undertake corrective action at the site and pay for cleanup and third party costs directly. EPA expects that most States will do so only if the owner or operator is unable or unwilling to pay these costs.

More frequently, State funds are designed assuming that a responsible party (RP) - lead cleanup will occur, either voluntarily or pursuant to a State administrative or judicial order. Acceptable methods of payment under this fund design include, but are not limited to:

- o direct payment to a RP's contractor
- o direct payment to a RP based on invoices received from his contractor
- o joint payment to a RP and his contractor

These payments typically take place periodically as work progresses, based on invoices received ("costs-incurred" basis). In addition, these same methods of payment are acceptable for satisfying third party claims, settlements, and judgements.

In the situations above, the owner or operator takes the lead on the cleanup and handling third party claims, but once he has paid the deductible, the State fund becomes the source of payment, thus providing financial assurance.

4. "Assurance" Provided by Reimbursement Funds

Some State funds, however, operate primarily as reimbursement funds, paying out costs only after the owner or operator has paid for the cleanup and/or any third party liability claims. The owner or operator then applies to the State for reimbursement of these costs, supported by proof that he has already paid them. With this fund design, EPA is concerned that where an owner or operator lacks the funding to pay for the cleanup or satisfy third party claims (despite the promise of reimbursement), the site will remain unaddressed. Therefore, a reimbursement-only fund (even one that provides for interim reimbursements) is not, by itself, approvable. It must also be structured to provide State payment (as described in "Methods of Payment") of the costs it purports to cover in the event that the owner or operator is incapable of, or unwilling to, cover these costs prior to being reimbursed.

Specifically, if the State intends to provide full coverage, the fund must be structured to provide payment of costs by the State from the "first dollar" of cleanup costs incurred. If the State intends to provide partial coverage (e.g., above a deductible amount), the fund must be structured to provide payment of costs by the State after the owner or operator has satisfied the deductible. For example, a State fund that assures all owners and operators within the State that it will reimburse all corrective action costs above \$10,000 is approvable (as a partial coverage mechanism) but only if it also provides for State payment (as described in "Methods of Payment") of the costs above \$10,000 should the owner or operator be unable or unwilling to pay them prior to reimbursement.

The exact nature of the State statutory or administrative provisions governing the fund necessary to demonstrate the State's commitment to pay these costs should be carefully evaluated by the Region on a State-by-State basis. The approach and language employed by States to demonstrate their commitment need not be uniform, and may vary between States. In particular, some State funds that use the term "reimbursement" are designed to be implemented using one of the acceptable payment methods described previously, and thus, could be approvable. The Region must determine whether the provisions of the fund are legally sufficient to satisfy EPA's policy objectives and must, as with other issues involved in approving State funds, be reviewed by the Office of Regional Counsel.

D. Eligibility for Use of the Fund

State funds can provide either unlimited or limited eligibility for use of the funds.

1. Unlimited Eligibility

State funds that cover all owners and operators in the State would have unlimited eligibility.

Some States have designed their funds to require that owners and operators pay a yearly tank fee in order to be eligible for fund coverage. We do not view a fee requirement as limiting eligibility because this provision is open to all owners and operators in the State and, in most cases, they are required to pay these fees.

2. Limited Eligibility

A State could set "entrance" requirements that limit the eligibility of owners and operators to use the fund. For example, a State may require that owners or operators perform a tank tightness test before being eligible for coverage by the fund. If States limit the eligibility of owners and operators to use State funds, the State should advise these owners and operators in advance that they are not eligible, and thus, must use other mechanisms to meet their financial responsibilities.

3. NOTE: A Caution About Post-Release Eligibility Determinations

To provide incentives for owners and operators to engage in good tank management practices, many States limit their fund coverage by using "substantial compliance" or other clauses. These provisions often limit eligibility to owners and operators

who are in "substantial compliance" with the technical requirements of the Federal and State UST regulations at the time of the release. After the release occurs, the State evaluates eligibility for fund coverage. This provision may be considered similar to private insurance, where UST owners and operators are required to comply with certain terms and conditions of the policy. Otherwise, the insurance company may elect to deny coverage after a leak occurs.

Our concern with this approach is that owners and operators who are out of compliance with some aspect of the UST regulations may believe they were covered by a State fund, only to find out at the time of the release that they were no longer eligible for coverage. In this situation, the State fund would not provide money for cleaning up the release, and it is highly unlikely that owners and operators would have obtained separate assurance mechanisms. We have concluded, however, that the same situation may occur with private insurance and, thus, States should not be precluded from having similar provisions.

EPA reviewers of State funds with these provisions should recommend to the State that eligibility criteria, particularly those which are evaluated after a release occurs, be as specific as possible so that owners and operators know ahead of time what they are expected to do to qualify for coverage. In addition, EPA reviewers should strongly urge the State not to bar itself from using the fund to respond to releases, even if questions about eligibility arise. The State should allow itself access to the fund in such circumstances, perhaps followed by cost recovery. This approach assures that money would be available, if needed, to clean up the release.

E. "Sunset" Provisions in State Funds

State funds may provide for the expiration of the fund (or revenue mechanism) at a designated time in the future. While many States may choose to reauthorize their funds to continue after this time, there is no guarantee of this occurring. Therefore, we recommend that approval of funds with "sunset" provisions be limited to the time for which the fund is currently authorized, or until it ceases to provide the required levels of coverage.

Regions should consider using the following language in approving funds that contain sunset provisions:

"Approval of this Fund is effective until such time as the funding mechanism expires, unless the State solicits and receives written authorization by the U.S. EPA that the Fund balance is sufficient to provide continued coverage in the amounts provided in the legislation."

In addition, at least sixty days prior to the termination of fund coverage, the State must notify all covered owners and operators that coverage is terminating, and advise them that they must obtain other mechanisms to satisfy their financial responsibility obligation.

APPENDIX

What the Rule Says (40 CFR Part 280.101)

Owners and operators can satisfy the Federal financial responsibility requirements if their State assures a State fund or other assurance mechanism exists to cover the corrective action and/or third-party liability costs established in the Federal regulations.

A State's fund or other assurance mechanism must be reviewed by the Regional Administrator only if EPA is administering the financial responsibility requirements (i.e., during the transition period before State Program Approval) and the State requests such review. In this case, the Regional Administrator must review the submitted mechanism to make sure that it:

- o Assures the availability of funds for taking corrective action and/or for compensating third parties;
- o Establishes the amount of funds that will be made available; and
- o Identifies the types of costs covered.

The State must submit to the Regional Administrator a description of the assurance mechanism and a list of the classes of USTs to which it applies.

The rule contains no deadline for review of a State's fund by the Regional Administrator. Pending EPA's determination, owners and operators are automatically considered to be in compliance with the financial responsibility requirements for the amounts and types of costs covered by the State fund.

Within 60 days after the Regional Administrator notifies a State that its assurance mechanism is acceptable, the State must provide each owner or operator for which it is assuming financial responsibility with notification that indicates:

- o The facility's name and address; and
- o The amount of funds assured by the State for corrective action and/or third-party liability.

NOTE: The purpose of the notification requirement is to ensure that owners and operators understand what they are required to do to comply with the financial responsibility regulations. It is especially important for owners and operators to know what coverage the State fund will provide and what coverage the owner or operator must obtain by securing another mechanism (e.g., insurance policy, State test of self-insurance, etc.). The State may decide the appropriate way to notify owners and operators of the amount of funds assured by the State for corrective action and/or third-party liability.

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REVIEWING STATE FUNDS FOR FINANCIAL RESPONSIBILITY

Phase 2 -- Meeting the State Program Approval Objective

Many States are now developing comprehensive UST programs which they intend to submit to EPA for State Program Approval. If the State's UST program meets EPA's published "Objectives" for approval, its program may be approved to operate in lieu of the Federal program. Some States intend to submit assurance funds and other mechanisms for EPA's review and approval as part of this process, to satisfy the financial responsibility objective. This document will help EPA reviewers understand what to look for as they evaluate these submissions of State funds as part of State Program Approval. It will also serve as a guide as you review and comment on State funds as they are being developed.

Keep in mind that the submission of funds to EPA is totally at the State's discretion. However, a State must submit its fund to EPA if it is using the fund to satisfy the financial responsibility objective as part of the State Program Approval process.

I. Basic Purpose of Financial Responsibility

The basic purpose of financial responsibility is simply to establish reasonable assurance that someone has the funds to pay for the costs of corrective action and third-party liability resulting from an UST release. This means that someone (or combination of persons) is ready to pay from the "first dollar" of costs incurred up to the maximum amount required by the Federal regulations.

II. Identifying the Specific Purpose of EPA's Review

EPA staff may be asked to review a State fund for three different reasons.

1. The State may be looking for general advice and comment on its proposed program to provide money to assist in cleanup.

2. The State may be seeking an official decision that tank owners and operators in the State may use the Fund as a mechanism for complying with the Federal financial responsibility requirements. (Section 280.101) This option is discussed in detail in the companion document "Phase 1 -- Helping Owners and Operators Comply with the Federal Requirements."
3. The State may be seeking EPA approval to operate a State UST program in lieu of the Federal program. In this event the State fund may be part of the State's financial responsibility package that will be examined by the Regional Office to determine if it is no less stringent than the Federal requirements. (Section 281.37)

If the State is looking for general advice on its proposed fund (described in 1, above) there are no formal review criteria. However, the EPA reviewer should ask the State if it intends to submit it as part of the State Program Approval package to meet all or part of the financial responsibility objective (described in 3, above). If the State intends to use its fund for this purpose, you should include the elements of review outlined in this document as part of your comments so the State can make the appropriate modifications during the development phase of its fund.

If the review is part of State Program Approval the State fund must satisfy the Federal financial responsibility objective (Section 281.37). When used for this purpose, the fund must provide coverage to all owners or operators in the full amount required by the Federal objective, or the State law or regulations must require owners or operators to supplement the coverage provided by the fund with another acceptable financial assurance mechanism (see discussion of Partial Coverage, below).

Remember that States do not necessarily need a fund to meet the federal objective for financial responsibility. Statutory or regulatory provisions that contain the federal coverage requirements are sufficient for State Program Approval, without use of a fund. In this situation, EPA does not review and approve the State's fund. Instead, it is up to the State to determine what mechanisms it will allow owners and operators to use to satisfy the State's financial responsibility requirements, and to oversee compliance.

III. Four Main Elements of State Fund Review

EPA's review of State funds as part of State Program Approval includes four main elements:

- o Funding Source
- o Amount of Fund
- o Coverage Provided
- o Eligibility for Use of the Fund

A. Funding Source

To assure that funds will be available to pay for cleanup and third-party damages, money must be reasonably certain and available. The State fund may need to rely on a definite funding source (e.g., tank fees) to make sure that funds will be available to owners and operators. A State fund that relies only on yearly appropriations out of general revenues from its legislature would not adequately assure that funds would be certain and available. The Federal LUST Trust Fund may not be relied on for this purpose either.

Many different sources can be used to finance a State fund, such as petroleum taxes, licensing or tank fees, bond issues, and risk-based premiums. The funding sources can be used alone or in combination.

The State fund need not be reserved for use solely on underground storage tanks. For example, it may include monies to respond to above ground tank releases or surface spills, as long as adequate amounts are available for UST releases.

B. Amount of Fund

There is no magic number for approving the amount of the fund. Instead, think of the fund as a "bank account" with money being "deposited" and money being "spent" as it is needed. The goal here is to reasonably assure that the projected flow of revenues into the fund is sufficient to keep pace with the anticipated rate of expenditures from the fund.

An exact amount is not given here because the demand for funds will fluctuate over time. When reviewing this feature of a State fund, remember that not all leaks will be discovered at the same time and, more importantly, not all corrective actions (at all sites) can be performed at the same time. Furthermore, some State fund programs are designed to first look to the owner or operator to undertake and pay for corrective action and third party claims. Where the owner or operator is unable or unwilling to do so, the State will usually have to assign priorities to such sites for responses using its fund. Factors such as the

number of State staff, procurement practices, and contractor availability will affect how quickly these sites can be addressed. Thus, the amount of the State fund should reflect the overall design of the State's cleanup and enforcement program, as well as the ability of the State to expend monies from the fund.

A State may want to consider various approaches that may be helpful in dealing with the uncertainty of expenditures described above. For example, a triggering provision could allow the funding source to be activated once the level of the fund has reached some bottom limit and, likewise, be deactivated when the level of the fund has reached an upper limit. A State may also want to think about adding a provision to trigger additional collection of funds when a State expects that a large release will be a significant drain on the State fund. Another provision that a State may want to consider, if it uses fees to support its fund, is to allow for a modification of the fee structure.

C. Coverage Provided

State funds can be developed to provide either full or partial coverage to help the State meet the financial responsibility objective for State program approval.

1. Full Coverage

If the State desires to satisfy the financial responsibility objective for State Program Approval by using its fund, a full coverage fund can be used to meet the entire objective. Assuming the fund is approved by EPA as part of State Program Approval, the State does not need to separately require that owners and operators demonstrate financial responsibility because the State fund provides all owners and operators in the State with the appropriate amounts of coverage.

A full coverage fund assures that for all owners and operators in the State money will be available to pay for corrective action and third-party liability costs in the amounts required by the Federal objective:

Per occurrence requirements:

- o \$500,000 per occurrence for non-marketers who pump 10,000 gallons or less each month; and
- o \$1 million per occurrence for everyone else.

Aggregate requirements:

- o \$1 million aggregate for those with 100 tanks or less;
- o \$2 million aggregate for those with more than 100 tanks.

The State fund does not necessarily need to prescribe specified limits of coverage. Limits in a State fund set maximum coverage amounts that the State fund will provide to an owner/operator for single or multiple releases occurring in a year. Without such limits, the State fund is able to cover an owner/operator for all releases in a year. On the other hand, if the State wishes to limit the coverage that it will provide for a particular release to an individual owner/operator in any given year, it may choose to establish per occurrence or aggregate limits of coverage. However, the limits must be no less than the Federal limits above.

First Dollar Coverage

A State fund can be considered a full coverage fund even if it has a deductible amount that the owner or operator is responsible for paying, as long as it provides for "first dollar coverage" by the State. First dollar coverage simply means that if owners and operators do not meet the deductible requirement, the State can still pay for corrective action and third party claims, including the deductible amount, by using its fund. In this instance, the State may want to consider pursuing cost recovery against the owner or operator for the deductible amount, although this would be at the State's discretion.

2. Partial Coverage

A State fund may be approved as providing only partial coverage if:

- o Coverage will be provided for only a portion of the dollar amounts or types of coverage (corrective action and third-party liability) required by the Federal objective; or
- o Coverage will be provided for only some owners or operators in the State. (See the "eligibility" section below for additional discussion of this choice.)

When the State uses a partial coverage fund to satisfy a portion of the financial responsibility objective for State Program Approval, the State must also require, by statute or regulation, that:

- o Owners and operators demonstrate responsibility for the amounts of corrective action and third-party liability costs that are not covered by the State fund; and
- o Owners and operators not covered by the fund demonstrate financial responsibility for at least the full amounts required by the Federal objective.

The rationale behind this is that for State Program Approval, the State's program must "stand alone" to fully meet the financial responsibility objective. In this case, the State's total program (partial coverage fund + State statute/regs.) can be approved as fully satisfying the financial responsibility objective.

For example, a partial coverage fund might only cover from \$10,000 to \$1 million in corrective action costs. The State must require that owners and operators find another mechanism to demonstrate coverage for the \$10,000 deductible for corrective action (unless the State fund provides "first dollar coverage" as described above). In this example, the State must also require owners and operators to demonstrate, through another assurance mechanism, coverage of third-party liability costs.

To help owners and operators comply with deductible requirements, EPA is allowing States to establish their own financial test of self-insurance for deductible amounts. The Federal test of self-insurance (either \$10 million or \$20 million net worth) is inappropriate when insuring for deductible amounts, which are often in the \$5000 to \$50,000 range. In establishing their test, States may want to consider requiring that the owner's or operator's minimum net worth be a specific multiple of the deductible amount.

3. Methods of Payment

Under any State fund, the State must provide reasonable assurance that it will pay full or partial coverage of cleanup and third party liability costs of an eligible owner or operator. The State can make this assurance in several ways. First, the State may undertake corrective action at the site and pay for cleanup and third party costs directly. EPA expects that most States will do so only if the owner or operator is unable or unwilling to pay these costs.

More frequently, State funds are designed assuming that a responsible party (RP) - lead cleanup will occur, either voluntarily or pursuant to a State administrative or judicial order. Acceptable methods of payment under this fund design include, but are not limited to:

- o direct payment to a RP's contractor

- o direct payment to a RP based on invoices received from his contractor
- o joint payment to a RP and his contractor

These payments typically take place periodically as work progresses, based on invoices received ("costs-incurred" basis). In addition, these same methods of payment are acceptable for satisfying third party claims, settlements, and judgements.

In the situations above, the owner or operator takes the lead on the cleanup and handling third party claims, but once he has paid the deductible, the State fund becomes the source of payment, thus providing financial assurance.

4. "Assurance" Provided by Reimbursement Funds

Some State funds, however, operate primarily as reimbursement funds, paying out costs only after the owner or operator has paid for the cleanup and/or any third party liability claims. The owner or operator then applies to the State for reimbursement of these costs, supported by proof that he has already paid them. With this fund design, EPA is concerned that where an owner or operator lacks the funding to pay for the cleanup or satisfy third party claims (despite the promise of reimbursement), the site will remain unaddressed. Therefore, a reimbursement-only fund (even one that provides for interim reimbursements) is not, by itself, approvable. It must also be structured to provide State payment (as described in "Methods of Payment") of the costs it purports to cover in the event that the owner or operator is incapable of, or unwilling to, cover these costs prior to being reimbursed.

Specifically, if the State intends to provide full coverage, the fund must be structured to provide payment of costs by the State from the "first dollar" of cleanup costs incurred. If the State intends to provide partial coverage (e.g., above a deductible amount), the fund must be structured to provide payment of costs by the State after the owner or operator has satisfied the deductible. For example, a State fund that assures all owners and operators within the State that it will reimburse all corrective action costs above \$10,000 is approvable (as a partial coverage mechanism) but only if it also provides for State payment (as described in "Methods of Payment") of the costs above \$10,000 should the owner or operator be unable or unwilling to pay them prior to reimbursement.

The exact nature of the State statutory or administrative provisions governing the fund necessary to demonstrate the State's commitment to pay these costs should be carefully evaluated by the Region on a State-by-State basis. The approach and language employed by States to demonstrate their commitment

need not be uniform, and may vary between States. In particular, some State funds that use the term "reimbursement" are designed to be implemented using one of the acceptable payment methods described previously, and thus, could be approvable. The Region must determine whether the provisions of the fund are legally sufficient to satisfy EPA's policy objectives and must, as with other issues involved in approving State funds, be reviewed by the Office of Regional Counsel.

D. Eligibility for Use of the Fund

State funds can provide either unlimited or limited eligibility for use of the funds.

1. Unlimited Eligibility

State funds that cover all owners and operators in the State would have unlimited eligibility.

Some States have designed their funds to require that owners and operators pay a yearly tank fee in order to be eligible for fund coverage. We do not view a fee requirement as limiting eligibility because this provision is open to all owners and operators in the State and, in most cases, they are required to pay these fees.

2. Limited Eligibility

A State could set "entrance" requirements that limit the eligibility of owners and operators to use the fund. For example, a State may require that owners or operators perform a tank tightness test before being eligible for coverage by the fund. If a State limits the eligibility of owners and operators to use a State fund, the State must require, by statute or regulation, that these owners and operators demonstrate financial responsibility for at least the full amount required by the federal objective.

3. NOTE: A Caution About Post-Release Eligibility Determinations

To provide incentives for owners and operators to engage in good tank management practices, many States limit their fund coverage by using "substantial compliance" or other clauses. These provisions often limit eligibility to owners and operators who are in "substantial compliance" with the technical requirements of the Federal and State UST regulations at the time of the release. After the release occurs, the State evaluates eligibility for fund coverage. This provision may be considered similar to private insurance, where UST owners and operators are required to comply with certain terms and conditions of the policy. Otherwise, the insurance company may elect to deny coverage after a leak occurs.

Our concern with this approach is that owners and operators who are out of compliance with some aspect of the UST regulations may believe they were covered by a State fund, only to find out at the time of the release that they were no longer eligible for coverage. In this situation, the State fund would not provide money for cleaning up the release, and it is highly unlikely that owners and operators would have obtained separate assurance mechanisms. We have concluded, however, that the same situation may occur with private insurance and, thus, States should not be precluded from having similar provisions.

EPA reviewers of State funds with these provisions should recommend to the State that eligibility criteria, particularly those which are evaluated after a release occurs, be as specific as possible so that owners and operators know ahead of time what they are expected to do to qualify for coverage. In addition, EPA reviewers should strongly urge the State not to bar itself from using the fund to respond to releases, even if questions about eligibility arise. The State should allow itself access to the fund in such circumstances, perhaps followed by cost recovery. This approach assures that money would be available, if needed, to clean up the release.

E. "Sunset" Provisions in State Funds

State funds may provide for the expiration of the fund (or revenue mechanism) at a designated time in the future. While many States may choose to reauthorize their funds to continue after this time, there is no guarantee of this occurring. Therefore, we recommend that approval of State programs with funds containing "sunset" provisions be limited to the time for which the fund is currently authorized, or until it ceases to provide the required levels of coverage.

Regions should consider using the following language in approving programs with funds that contain sunset provisions:

"Approval of this Program is effective until such time as the financial assurance funding mechanism expires, unless the State solicits and receives written authorization by the U.S. EPA that the Fund balance is sufficient to provide continued coverage in the amounts provided in the legislation."

In addition, at least sixty days prior to the termination of fund coverage, the State must notify all covered owners and operators that coverage is terminating, and advise them that they must obtain other mechanisms to satisfy their financial responsibility obligation.

APPENDIX

OSWER Directive 9650.8

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FINANCIAL RESPONSIBILITY FOR USTs CONTAINING PETROLEUM

OBJECTIVE § 281.37

(a) State requirements for financial responsibility must ensure that:	Cite Regulation	Statute
(1) owners and operators have \$1 million per occurrence for corrective action and third-party claims in a timely manner to protect human health and the environment;		
(2) owners and operators not engaged in petroleum production, refining, and marketing and who handle a throughput of 10,000 gallons of petroleum per month or less have \$500,000 per occurrence for corrective action and third-party claims in a timely manner to protect human health and the environment;		
(3) owners and operators of 1 to 100 petroleum USTs must have an annual aggregate of \$1 million; and		
(4) owners and operators of 101 or more petroleum USTs must have an annual aggregate of \$2 million.		
(b) Phase-in requirements. Financial responsibility requirements for petroleum UST systems must, at a minimum, be scheduled to be applied to all UST systems on an orderly schedule that completes a phase-in of the financial responsibility requirements within 18 months (see Note 2) after the effective date of the Federal regulations.		
(c) States may allow the use of a wide variety of financial assurance mechanisms to meet this requirement. Each financial mechanism must meet the following criteria: be valid and enforceable; be issued by a provider that is qualified or licensed in the State; not permit cancellation without allowing the State to draw funds; ensure that funds will only and directly be used for corrective action and third-party liability costs;		

FINANCIAL RESPONSIBILITY FOR USTs CONTAINING PETROLEUM (CONTINUED)

OBJECTIVE § 281.37

	Cite
	Regulation Statute
and require that the provider notify the owner or operator of any circumstance that would impair or suspend coverage.	
(d) States must require owners and operators to maintain records and demonstrate compliance with the State financial responsibility requirements, and these records must be made readily available when requested by the implementing agency.	

NOTES ON FULFILLING THE OBJECTIVE

1. States may establish a fund to provide financial assurance for certain classes of owners and operators or for all owners and operators. The general criteria for State funds are identified in paragraphs (a) and (c) above.
2. There is an error in the Federal Register printing of the financial responsibility phase-in schedule. The 18-month timeframe is incorrect; the correct time period for phasing in the requirements is October 26, 1990, or 21 months after the effective date of the Federal regulations. This error was corrected in a supplemental notice to the Federal Register on December 21, 1988 (53 FR 51273).
3. More discussion on financial responsibility for UST owners and operators may be found in the preamble to the Federal financial responsibility requirements (53 FR 43365), and in the preamble to the State Program Approval Financial Responsibility objective (53 FR 43382).

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